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4 *Attorney for the Plaintiffs*

5
6 **UNITED STATES DISTRICT COURT**
7 **DISTRICT OF NEVADA**

8 * * *

9 JOHN AND MELISSA FRITZ,

Case No.: 3:20-CV-00681-RJC-WGC

10 Plaintiffs,

11 vs.

**SECOND AMENDED COMPLAINT
FOR DAMAGES AND
DECLARATORY RELIEF**

12 WASHOE COUNTY, a political subdivision of
the State of Nevada; and DOES 1 through 10
13 inclusive;

JURY TRIAL DEMANDED

14 Defendants.
_____ /

15 COME NOW, JOHN AND MELISSA FRITZ, a married couple (“the Fritzes” or
16 “Plaintiffs”), by and through the undersigned counsel, and file the following Second Amended
17 Complaint seeking redress for the violation of the Fritzes’ right to just compensation for the taking
18 of private property for public use in violation of the Fifth Amendment of the United States
19 Constitution by WASHOE COUNTY, a political subdivision of the State of Nevada; and DOES
20 I through X, inclusive.

21 **JURISDICTION**

22 1. This Court has subject matter jurisdiction over Plaintiffs’ claims pursuant to 28
23 U.S.C. §§ 1331 and 2201(a). There is federal question jurisdiction under 28 U.S.C. § 1331 because
24 Plaintiffs allege violations of the federal Constitution. Plaintiffs seek a declaration of their rights
25 pursuant to the Federal Declaratory Judgment Act, 28 U.S.C. § 2201.

26 2. This Court has personal jurisdiction over Defendants because (a) they are located
27 in the District in which this action was filed; and (b) the actions giving rise to these claims occurred
28 in and/or were directed from this District.

1 a large area of impervious surfaces that increased stormwater runoff into Whites Creek by virtue
2 of the construction of rooftops, streets, and driveways, resulting in increased runoff as compared
3 to pre-development conditions.

4 13. The water from Mt. Rose Highway and the stormwater runoff from Lancer Estates
5 and Monte Rosa are diverted into Whites Creek No. 4 upstream from the Fritz property, where
6 in a pre-development condition, the same water from storms drained into Whites Creek No.4
7 downstream from the Fritzes Property.

8 14. The Fritzes purchased the property in 2001 and then built their home, and a garage,
9 and shop.

10 15. After a severe flood in Late December of 2005 during which Whites Creek No. 4
11 overflowed onto and flooded the property, the Fritzes became concerned and began to take
12 measures to try and prevent flooding of the buildings and on the property, such as building a
13 boulder berm and grading the Property to direct water away from the structures on the Property.

14 16. Although construction of Lancer Estates began in the 1980s, development of
15 Monte Rosa was not completed until 2007.

16 17. John Fritz did not know that the diversion and superinduction of water was causing
17 the flooding on the property until he discovered the "NDOT letter" in 2010.

18 18. The NDOT letter, authored by a District Engineer at the Nevada Department of
19 Transportation on June 13, 1996 shows that the County agreed to direct the developers of Lancer
20 Estates to transfer all water in excess of 10 CFS from Mt. Rose Highway into Whites Creek No.
21 4.

22 19. A 1990 letter from CFA, the engineering firm that designed Lancer Estates, showed
23 that Washoe County and the developers of Lancer Estates knew and agreed that development of
24 the site would increase runoff into Whites Creek No. 4 through the Fritz property.

25 20. The CFA letter acknowledges increased runoff caused by the Lancer Estates
26 development would not be retained on site but would be directly discharged, unmitigated, into
27 Whites Creek No. 4.

1 21. In 1994, the County commissioned a study of the hydrology of the Whites Creek
2 area that identified the Fritz property to be in a “problem area” for flooding.

3 22. The Lancer Estates storm drainage system was designed to carry out the directive
4 from the County to divert water from Mt. Rose Highway that exceeded 10 cubic feet per second
5 (cfs) through Lancer Estates, and into Whites Creek #4.

6 23. The diversion and superinduction of water into Whites Creek from Mt. Rose
7 Highway, Lancer Estates, Monte Rosa, and the Estates at Mount Rose and across the Fritzes
8 Property has caused damage to the Fritzes Property.

9 24. On August 9, 2014 the Fritzes experienced flooding on their Property, where
10 Whites Creek No. 4 overflowed onto and flooded the Property.

11 25. In January and February of 2017, the Fritzes again experienced severe flooding on
12 their Property, where Whites Creek No. 4 overflowed onto and flooded the Property.

13 26. Since the flood on the Fritzes Property in 2017, Washoe County has continued to
14 permit and substantially patriciate in the development of stormwater infrastructure in the Whites
15 Creek watershed that diverts and adds additional stormwater runoff via the creation of impervious
16 surfaces, which exacerbates the flooding risk to the Fritzes parcel.

17 27. From 2006 to the date of filing of this complaint, another development was and is
18 being planned and constructed in the Whites Creek watershed entitled the Estates at Mt. Rose.
19 The hydrology plans for the Estates at Mt. Rose included retention and/or detention ponds for
20 the mitigation of the increased risks of flooding created by the development.

21 28. The purpose of a detention pond in a development is to detain and slowly release
22 in controlled fashion storm water flow increases caused by the creation of impervious surfaces to
23 prevent damage to downstream properties.

24 29. However, the Plaintiffs have very recently discovered, in late 2020, that the plans
25 for the Estates at Mt. Rose for detention and/or retention ponds were not followed.

26 30. In at least one instance the planned retention and/or detention pond was not
27 constructed because Truckee Meadows Water Authority (“TMWA”) is or has constructed a Water
28

1 Treatment Facility on the site where the detention and/or retention ponds were to be built for
2 the Estates at Mt. Rose according to the plans submitted to Washoe County for approval.

3 31. Washoe County approved special use permit No. 15-102 for TMWA in February
4 of 2016. The practical effect of the approval of this special use permit was that the detention
5 pond No. 1 listed in the hydrology report for Estates at Mount Rose 3b was deleted from the
6 plans, and the runoff from the development was permitted to be discharged into Whites Creek
7 without any mitigation of the effect of the displacement of water from the paving over of the land
8 for the development.

9 32. During the course of the Fritzes claim in state Court, Washoe County never
10 disclosed to the Fritzes that the detention pond that was to be built for the Estates at Mount Rose
11 was to be deleted.

12 33. The construction of the TMWA plant on the site where the detention pond was to
13 be build did no commence until approximately late 2019.

14 34. On September 25, 2018, Washoe County accepted dedication of the streets in the
15 Estates at Mount Rose but did not record the resolution accepting the streets with the Washoe
16 County Recorder until February 10, 2020. *See* Exhibit 2.

17 35. The Fritzes became aware of the fact that the detention pond that was to be built
18 for the Estates at Mount Rose was to be deleted due to the recent construction of TMWA's facility
19 in the area.

20 36. The deletion of the detention and/or retention pond for the Estates at Mt. Rose
21 and the construction of the houses and associated improvements without the detention and/or
22 retention pond will cause further stormwater flooding impacts to downstream properties,
23 including, but not limited to the Fritzes Property.

24 37. The diversion and superinduction of water into Whites Creek from Mt. Rose
25 Highway and the upstream developments and through the Fritzes Property are for public use, i.e.
26 to protect upstream property from flooding risks, at the expense of downstream properties.

1 38. The diversion and superinduction of water into Whites Creek from Mt. Rose
2 Highway and the upstream developments and through the Fritzes Property are conveyed through
3 public facilities owned or controlled by Washoe County.

4 39. Washoe County has taken and continues to take an unlimited flowage easement on
5 the Fritzes Property to protect upstream properties from flooding, including Lancer Estates,
6 Monte Rosa, Mount Rose Highway, and the Estates at Mt. Rose without paying just compensation
7 for the flowage easement.

8 40. The Fritzes have been forced to bear the burden of the increase of and the
9 diversion of stormwater through their property caused by the development of upstream land and
10 stormwater infrastructure upstream from their property that should fairly be borne by the public
11 at large. *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

12 41. The Fritzes filed suit in the Second Judicial District Court of the State of Nevada
13 on April 4, 2013 in accordance with the then existing state remedy exhaustion requirement in the
14 Supreme Court's decision in *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172,
15 105 S. Ct. 3108 (1985), claiming that their property had been taken by Washoe County for public
16 use without just compensation having been paid.

17 42. In June of 2019, in *Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2164 (2019), the Court
18 overruled the exhaustion requirement in Williamson County and expressly provided that taking
19 claims against local governments may be brought under 42 U.S.C. 1983 at the time that a taking
20 occurs.

21 43. The Fritzes' claim was initially dismissed on summary judgment by the District
22 Court, which was reversed by the Nevada Supreme Court in *Fritz v. Washoe County*, 132 Nev. Adv.
23 Op. 57, 376 P.3d 794, 2016 WL 4140940 (2016).

24 44. In the *Fritz v. Washoe County* decision, the Nevada Supreme Court established a six-
25 part test to determine whether an inverse condemnation claim under State Law would succeed: 1)
26 a taking (2) of real or personal interest in private property (3) for public use (4) without just
27 compensation being paid (5) that is proximately caused by a governmental entity (6) that has not
28 instituted formal proceedings. *Id.*

1 45. On remand, the Nevada District Court bifurcated the liability and damages
2 components of the case and then held bench trial on the liability issues on April 9, 2018, to April
3 11, 2018, after which the Court issued its April 24, 2018 Findings of Fact and Conclusions of Law
4 and Judgment After Bench Trial (“District Court’s Order”) in favor of Washoe County.

5 46. The District Court’s Order made the followings findings of fact: Whites Creek No.
6 4 crosses the Fritzes property; Washoe County directed the developers of Lancer Estates to divert
7 water from Mt. Rose Highway that exceeded 10 cfs through Lancer Estates and into Whites Creek
8 No. 4; that the construction of Lancer Estates and Monte Rosa increased runoff into Whites Creek
9 No. 4; the Lancer Estates storm drainage system is designed to accommodate a 10-year event but
10 not a 100-year event; Prior to the construction of Lancer Estates, a large percentage of water that
11 flowed through Lancer Estates and drained into Whites Creek No. 4 below the Fritzes Property
12 whereas after development that water enters Whites Creek No. 4 upstream from the Fritzes
13 property; that because Washoe County took numerous actions that modified the natural drainage
14 of Lancer Estates, Monte Rosa, and Mt. Rose Highway, that Washoe County’s actions constitute
15 substantial involvement in the development of private lands.

16 47. Despite these facts, the District Court concluded that because the Fritzes property
17 has been used for practical purposes other than a flood channel, that there was no substantial
18 injury to the economic value of the property and that no taking had occurred.

19 48. Plaintiffs then appealed the Nevada District Court’s ruling to the Nevada Supreme
20 Court, which issued an Order of Affirmance of the District Court’s Order on May 31, 2019. See
21 *Fritz v. Washoe Cty.*, 441 P.3d 1089 (Unpub. Nev. 2019).

22 49. The Nevada Supreme Court’s Order of Affirmance does not cite to Federal Law
23 and relied on a requirement in Nevada law, that the Fritzes show “substantial injury” in addition
24 to physical invasion in order to prove a taking occurred. *Id.*

25 50. The Fritzes then filed Petition for Writ of Certiorari to the United States Supreme
26 Court. The basis for the Fritzes Petition to the United States Supreme Court was that the Nevada
27 Supreme Court’s decision that to show a taking a party must demonstrate “substantial injury” to
28 the economic usefulness of the property was inconsistent with Federal takings decisions in *Loretto*

1 *v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) and *Arkansas Game & Fish Comm’n v.*
 2 *United States*, 568 U.S. 23, 38 (2012).

3 51. The Fritzes Petition was supported by the filing of an Amici Brief by the Pacific
 4 Legal Foundation, which argued that the Nevada Supreme Court’s decision permitted Washoe
 5 County to take a flowage easement, destroying the Fritzes right to exclude the County from their
 6 Property, without paying just compensation.

7 52. The Supreme Court denied the Fritzes’ Petition without comment on May 4, 2020
 8 in Docket No. 75636. An order denying a petition for a writ of certiorari is not a reflection of the
 9 Supreme Court’s views on the merits of a case or jurisdiction. *Supreme Court Practice*, Eleventh
 10 Edition, Bloomberg Law (2020).

11 53. Since the decision of the US Supreme Court, the Fritzes subsequently discovered
 12 in late 2020 that Washoe County approved special use permit No. 15-102 for TMWA in February
 13 of 2016. The circumstances surrounding the Fritzes discovery of the Estates at Mount Rose 3(b)
 14 are described in the Declaration of Clark Stoner, P.E., attached hereto as Exhibit 1.

15 54. The practical effect of the approval by Washoe County of special use permit No.
 16 15-102 for TMWA was that the detention pond No. 1 listed in the hydrology report for Estates
 17 at Mount Rose 3b was deleted from the plans, and the runoff from the development was permitted
 18 to be discharged into Whites Creek without any mitigation of the effect of the displacement of
 19 water from the paving over of the land for the development.

20 55. The fact that the proposed detention pond for the Estates at Mount Rose 3(b) was
 21 to be deleted was never disclosed to the Fritzes by Washoe County during the course of
 22 proceedings in the underlying state case, or otherwise. *See* Exhibit 1.

23 56. Washoe County has taken a perpetual flowage easement—allowing use of the Fritz
 24 property to prevent flooding on Mount Rose Highway, Lancer Estates, the Estates an Mount
 25 Rose, and Monte Rosa—for free. Federal Law has treated physical invasions as a distinct species
 26 of public use of private property and has long recognized that even temporary occupations are
 27 governed by a categorical rule. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*,
 28 535 U.S. 302, 322 (2002) (“When the government physically takes possession of an interest in

property for some public purpose, it has a categorical duty to compensate the former owner.”) (citing *United States v. Pewee Coal Co.*, 341 U.S. 114, 115 (1951)), with *Arkansas Game and Fish Comm’n v. United States*, 568 U.S. 23, 31 (2012) (“In view of the nearly infinite variety of ways in which government actions or regulations can affect property interests, the Court has recognized few invariable rules.”).

57. Nevada’s takings jurisprudence as cited and applied in the Fritzes case by Nevada state courts is not coextensive with Federal takings law because it required the Fritzes to show “substantial injury” in addition to physical occupation of their property to show a taking. As such, the Fritzes state case should not preclude their bringing this claim. *San Remo Hotel, L.P. v. City & Cty. of S.F.*, 545 U.S. 323, 335, 125 S. Ct. 2491, 2500 (2005).

58. Further, Washoe County has engaged in additional acts subsequent to the decision in the state court case described above in the Whites Creek watershed that will increase the amount of water flowing across the Fritzes Property during storm events. Namely, Washoe County has permitted continued development in the Whites Creek watershed to occur while allowing development without mitigation measures to prevent downstream flooding on the Fritzes Property.

59. Thus, Washoe County’s own actions have resulted in a further taking of the Fritzes property for public use without just compensation and resulted in a situation where the issue to be decided in this case is distinct from the issue that was decided in the Fritzes previous case that was litigated in State Court.

CLAIMS FOR RELIEF

42 U.S.C. § 1983 - VIOLATION OF THE TAKINGS CLAUSE OF THE FIFTH AMENDMENT

60. Plaintiffs repeat and reallege the allegations set forth in the foregoing Paragraphs as though fully set forth herein.

61. The Fifth Amendment to the United States Constitution provides in relevant part: “[N]or shall private property be taken for public use, without just compensation.”

62. Defendant took the Plaintiffs’ private Property for public use.

1 63. Defendant has not instituted formal proceedings to take the Plaintiffs' real or
2 personal property.

3 64. Defendant has not paid just compensation to the Plaintiffs for the taking of
4 Plaintiffs' real or personal property.

5 65. By its conduct, as described herein, Defendant is liable to the Plaintiff under 42
6 U.S.C. § 1983 for taking the Plaintiffs' property for public use without first paying just
7 compensation by physical invasion of water resulting from failure to design, engineer, construct
8 or maintain storm water and wastewater conveyances in a manner as not to foreseeably flood
9 private property; and through approval of, acceptance of dedications, and annexation of
10 infrastructure to transport storm water and wastewater from one private property to another.

11 66. The actions of Washoe County described herein executes a policy statement,
12 ordinance, regulation, or decision officially adopted and promulgated by Washoe County's
13 officers.

14 67. Defendant Washoe County has directly acted to and developed, implemented,
15 enforced, encouraged and sanctioned express and implied de facto policies, practices, and/or
16 customs of unlawfully using the Property of others as a floodway without having first paid just
17 compensation.

18 68. The Constitutional abuses and violations by Defendant Washoe County were and
19 are directly and proximately caused by policies, practices and/or customs developed,
20 implemented, enforced, encouraged and sanctioned by Washoe County, including its practice and
21 policy of unlawfully and surreptitiously using the Plaintiffs' Property as a floodway without paying
22 for the right to do so.

23 69. Pursuant to 42 U.S.C. §§ 1983 and 1988, Plaintiffs are entitled to money damages
24 for the unconstitutional taking of their property as well as declaratory relief.

25 70. Plaintiffs are therefore entitled to an award of attorneys' fees and costs pursuant to
26 42 U.S.C. § 1988.

27 71. In addition to the relief requested above, the Plaintiffs requests relief as described
28 in the prayer for relief below.

DECLARATORY RELIEF UNDER 28 U.S.C. § 2201

72. Plaintiffs repeat and reallege the allegations set forth in the foregoing Paragraphs as though fully set forth herein.

73. The Fifth Amendment to the United States Constitution provides in relevant part: “[N]or shall private property be taken for public use, without just compensation.”

74. Defendant took the Plaintiffs’ private Property for public use.

75. Defendant has not instituted formal proceedings to take the Plaintiffs’ real or personal property.

76. Defendant has not paid just compensation to the Plaintiffs for the taking of Plaintiffs’ real or personal property.

77. There is a genuine and bona fide dispute and an actual controversy and disagreement between Washoe County and the Fritzes regarding whether Washoe County has taken the Fritzes property for public use without paying just compensation.


78. Pursuant to the Uniform Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2201, the Fritzes in good faith request that the Court declare the following:

1. That Washoe County’s actions in the Whites Creek watershed constitute a taking of the Fritzes property for public use;
2. That the Fritzes have a right to just compensation for the taking of their property for public use;
3. That the Fritzes right to exclude the public, including Washoe County, from the use of their property unless just compensation is paid;
4. That Washoe County has violated the rights of the Fritzes under the 5th Amendment by taking a flowage easement on their property without having paid just compensation; and
5. That Washoe County’s continued approval of development that increases flooding risks in the Whites Creek area without adequate stormwater mitigation measures constitutes the taking of downstream properties for public use without just compensation in violation of the 5th Amendment.

1 WHEREFORE, the Plaintiffs request that this Court:

- 2 A. Enter a declaratory judgment that the actions of Washoe County complained of
3 herein are unlawful and violate the United States Constitution;
4
5 B. Order Defendant to pay just compensation to Plaintiffs for the taking of their
6 property for public use in amounts to be proven at trial;
7
8 C. Order Defendant to pay compensatory and consequential damages in an amount
9 to be proven at trial;
10
11 D. Order Defendant to pay attorneys' fees and costs of the action pursuant to 42
12 U.S.C. § 1988;
13
14 E. Order the Defendant to pay the fees and costs associated with any exhaustion of
15 state court remedies as then required by *Williamson Cty. Reg'l Planning Comm'n v.*
16 *Hamilton Bank*, 473 U.S. 172, 105 S. Ct. 3108 (1985).
17
18 F. Order Defendant to pay pre- and post- judgment interest at the legal rate as
19 appropriate; and
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21 G. Grant any further relief that the Court deems just and proper.

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DATED this 3/11/2021

By: 
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Exhibit List

1. Declaration of Clark Stoner P.E.
2. Resolution Accepting Real Property for Use as a Public Street, Recorded February 10, 2020.

CERTIFICATE OF SERVICE

Pursuant to FRCP 5(b), I certify that on the date shown below, I caused service to be completed of a true and correct copy of the foregoing Document by:

_____ personally delivering;
_____ delivery via Reno/Carson Messenger Service;
_____ sending via Federal Express (or other overnight delivery service);
_____ depositing for mailing in the U.S. mail, with sufficient postage affixed thereto; or,
_____ X delivery via electronic means (fax, eflex, NEF, etc.) to:

MICHAEL W. LARGE
Deputy District Attorney
One South Sierra Street
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(775) 337-5700
ATTORNEY FOR WASHOE COUNTY

DATED this March 11, 2021

By: /s/ Luke Busby.